

# for The Defense



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shimmering air. Barely able to trudge up the three steps to the door, the group found it secured. But without hesitation, reasonably believing that this was their last chance at salvation, the father broke the glass and opened the door. Three days, three steaks and three six-packs later, the Sheriff's Posse rescued and arrested them. Since the victim/owner of the cabin wished to prosecute, and in Arizona, what victims want, victims get, they were booked for residential burglary, theft, and trespass. Since the father had his hunting rifle with him, he was charged with armed burglary. What possible defense can there be when the father admits his crime? The common law defense of necessity.

Too far-fetched a scenario? No, not really. Whether you're in the mountains trying to save your family from freezing, or in the desert trying to save your family from dying of exposure, these types of things happen in Arizona. Sometimes situations where the necessity defense is warranted, occur right in the city. A couple of examples come to mind

## NECESSITY IS THE MOTHER OF INVENTION

By Russ Born  
Training Director

The blowing sleet felt like dozens of shiny razor blades slicing into his face. Cutting, stinging, dulling his senses with each passing moment. But that was the least of his worries. He glanced back at his teenage son and twenty-year-old daughter, tethered to a rope wrapped around his waist. Not much time left. This family hunting trip may be their last. Catching them by surprise, far from base camp, this renegade spring storm in the White Mountains was taking its toll. Shelter, in whatever form, would be their salvation. Suddenly to their wonderment, as if placed there by the Snow Queen herself, a huge log cabin materialized through the

You and your spouse have put the kids to bed and you decide to share a bottle of wine. Sometime later, just as you're about to retire, your child suffers an asthma attack. It's serious and from prior experience you know that your child needs to go to the hospital immediately. You quickly get the child into the car, drive a ½ mile to the hospital where your child receives emergency treatment. A police officer who is at the hospital is alerted by a nurse that you have been drinking. You're given a ticket for D.U.I.. But you made a wise choice. You chose the lesser of two evils. Do you have a necessity defense to the charge of D.U.I.? The answer is yes!

Still not realistic enough for you? What about this situation! A young autistic boy climbs up a high-voltage utility tower. His brother, aware of the precarious nature of the situation, bravely climbs up after him in a effort to save him. Speeding to the scene in order to help prevent a possible tragic ending for both boys, the father receives a traffic ticket. Necessity defense? You bet!

At this point you may be asking yourself several questions. Where did this defense come from? Why was it recently codified? What situations can it be used in and how do you use it? This article will attempt to answer most of those questions.

### Historical Perspective

In criminal law, the common law defense of necessity has been around for quite some time. The writers of the original English Draft Code of 1879 were concerned with preserving this very defense.<sup>1</sup> They proposed to preserve all "rules and principles of the common law which render any circumstances a justification or excuse for any act or a defense to any charge."

Necessity has historically been referred to as the "Choice of Evils" defense. The comments to the Model Penal Code talk about why the common law defense of necessity is important to the fair administration of criminal justice. They conclude that "a principle of necessity, properly conceived, affords a general justification for conduct that otherwise would constitute an offense; and that such a qualification, like the requirement of culpability, is essential to the rationality and justice of all penal prohibitions."<sup>2</sup> In other words, the defense of necessity not only makes sense, it is good public policy.

Why then haven't we heard more about this defense? As the Model Code admits, judicial decisions are not very common. Several reasons may have tended to

minimize the number of reported necessity decisions. The first may be that someone, whether it was a police officer, a judge, or a prosecutor, used some good common sense. They took care of the case before it ever got into the system, or before it got too far along. Another reason for the limited number of published decisions is that many times, when the defense of necessity is used, it really is a hybrid duress defense. Conversely several Arizona cases

that discuss the duress defense are really necessity cases.<sup>3</sup> This situation occurs because duress was codified. Defendants raising necessity defenses often did so under the duress statute. But the

results were usually unrewarding because of the differences in the elements of both defenses.

Duress contemplates that the defendant is being *compelled by another, under threat of immediate physical force*. That force must be of the type which could result in serious physical injury to the defendant or another person. Necessity *does not require the threats of another* before the defense may be valid. But it does require that certain other conditions be met, in order to be used successfully. Before 1997 these conditions were set out in the case law because necessity was not codified.

### Codification of Necessity

In 1997, Arizona chose to codify necessity as an affirmative defense. But the reason behind the codification was not an altruistic one. Due to a perception by the Attorney General's Office (valid or not), that several common law defenses were being used improperly, that office proposed several pieces of inter-related legislation. The first was Arizona Revised Statute §13-103 Abolition of common law offenses and affirmative defenses. §13-103 reads as follows:

#### **§13-103. Abolition of common law offenses and affirmative defenses; definition**

**A.** All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense unless it is an offense or an affirmative defense under this title or under another statute or ordinance.

**B.** For the purpose of this section, "affirmative defense" means a defense that is offered and that attempts to justify the criminal actions of the accused or another person for whose actions the accused may be deemed to

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be accountable. Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.

Added by Laws 1977, Ch. 142, § 39, eff. Oct. 1, 1978.

Amended by Laws 1977, Ch. 136, § 3.

As part of that package of legislation, the Attorney General also proposed the codification of entrapment and the common law defense of necessity. This was due to the recognition by both the Attorney General's Office and the Arizona Legislature that both entrapment and necessity were legitimate affirmative defenses. The necessity statute was modeled after Illinois' necessity statute and Arizona's duress statute.

#### § 13-417. Necessity defense

A. Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct.

B. An accused person may not assert the defense under subsection A if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct.

C. An accused person may not assert the defense under subsection A for offenses involving homicide or serious physical injury.

Added as § 13-416 by Laws 1997, Ch. 136, § 5. Renumbered as § 13-417.

Previously I mentioned the distinction between necessity and duress, and the problem of trying to use a necessity defense under the duress statute. This distinction is clarified by examining the differences in paragraph (A) of both statutes.

#### §13-412 Duress

A. Conduct which would otherwise constitute an offense is justified if a

reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

B. The defense provided by subsection A is unavailable if the person intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress.

C. The defense provided by subsection A is unavailable for offenses involving homicide or serious physical injury.

Added by Laws 1977, Ch. 142, § 44, eff. Oct. 1, 1978.

Amended by Laws 1978, Ch. 164, § 5, eff. Oct. 1, 1978.

Other than the difference in the triggering mechanisms (the nature of the compelling forces) set out in paragraphs A, the elements of duress and necessity are fairly identical.

#### Affirmative Defense

Necessity, like duress, is an affirmative defense. As such it must be noticed by defense counsel in their Rule 15.2 Notice of Defenses; no notice = no defense!

#### Burden

As with the affirmative defense of duress, there must be some evidence before the court to support the defense. Under ARS 13-205, the burden is preponderance of the evidence. This does not mean, however, that the defense must present evidence. The evidence to support the defense may be brought out during the presentation of the state's case as often occurs in self-defense cases. In the case of necessity, there must be some evidence that facts existed which led the defendant to choose between the lesser of two evils. There are, however, situations when a legitimate choice between the lesser of two evils exists, but the necessity defense is not available to negate the criminality of the conduct. Under §13-417(C), a defendant cannot assert necessity if the lesser evil involves homicide or serious physical injury. The same is true for duress.<sup>4</sup>

This position, although not totally supported by the Model Code, is one that quite a few states have adopted. Public policy seems to dictate that no matter what the circumstance (excluding self-defense) you have to take the bullet or the beating, as the case may be. Take, for example, the situation where someone points a gun at you and orders you to kill a third person under the express threat that it is either you or the third party. Duress or necessity is not available as a defense if you kill or seriously injure that third person. Rewarding selfishness is not good public policy. But the Model Code does point out situations where making the choice to sacrifice one life in order to save others may be justified. An example is where one rock climber is tied to a companion who has fallen off the face of a cliff. The first climber makes the decision to cut the rope in order to save several others from being pulled off to their deaths. One life lost for the benefit of others. As the Model Code points out, "the law should permit such a choice."<sup>5</sup> These situations are rare, however, and hopefully never become the source of a criminal charge.

### Limitations

There are a few other qualifiers that limit the use of a necessity defense. One is that the evil to be avoided must be imminent. The other is that a person cannot have "intentionally, knowingly, or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct." An interesting example of these types of restrictions is found in the Arizona case of *State v. Kinslow*.<sup>6</sup> That case is one of those hybrid duress-necessity defenses.

Jimmy Kinslow was a convict who took it upon himself to successfully escape from the New Mexico State Penitentiary. But what he did not count on was the New Mexico authorities issuing a "shoot to kill" order. Mr. Kinslow decided that he needed to take some hostages in order to prevent the more egregious evil of being shot. The Arizona Supreme Court held that it was Kinslow's escape from prison that precipitated the "shoot to kill" order. Therefore, Kinslow could not argue that the "shoot to kill" order thrust him into a position where taking hostages was his only recourse. Additionally, three weeks passed between his escape and the taking of the hostages, another escapee was taken peacefully, and Jimmy had been seen by a police officer who recognized him but did not draw a weapon. Thus the harm that Kinslow claimed was being directed towards him was not imminent. Therefore, he could not avail himself of a necessity defense.

One other interesting case that helps explain the requirement that the evil which is sought to be avoided must be imminent is *State v. Belcher*.<sup>7</sup> Mr. Belcher's car was stopped by a police officer when the officer noticed four marijuana plants in it. Mr. Belcher testified at his trial that he found the plants growing in a wash earlier in the day. He decided later that night that he should go back to retrieve the plants to keep them out of the hands of children. The Court of Appeals upheld the trial court's ruling that necessity was not available as a defense. The basis for the ruling was the lack of an imminent threat to others posed by the plants. This lack of an imminent threat produced another more viable option, namely calling the police instead of taking personal possession of the plants. Once again, the lack of immediacy thwarted any use of a necessity defense.

### Scope of Application

Becoming aware of the restrictions on the use of necessity as a defense, leads us to the issue of its scope and application. Researching the law on necessity, it becomes apparent that necessity is a defense not only to state and federal offenses, but to municipal and traffic offenses. Since our state's case law is limited regarding necessity, some guidance from other state and federal cases is appropriate. Because our statute is patterned after the Illinois statute, references to Illinois cases are helpful.

**"Researching the law on necessity, it becomes apparent that necessity is a defense not only to state and federal offenses, but to municipal and traffic offenses."**

In the case of *City of Chicago v. Mayer*,<sup>8</sup> Mr. Mayer was charged with disorderly conduct and interfering with a police officer. This was a violation of a municipal ordinance. Mr. Mayer was a third year medical student who attempted to prevent a police officer from moving an injured person without a stretcher. Mayer believed the person's neck may have been broken. After a shouting and shoving match, Mayer was arrested. The trial court denied Mayer's offered instruction on the defense of necessity. Arguing on appeal that the necessity defense is only available when someone is charged with a penal violation, the prosecutor contended that the defense was unavailable for a violation of a municipal ordinance. Reversing the trial court and remanding the case for a new trial, the Illinois Supreme Court ruled that necessity was "as applicable to an ordinance violation charge . . . , as it is to the charge of violating a penal statute. Certainly if this can be a defense to conduct which can be more serious in nature, it should be no less available to one charged with violating a law that is not penal in nature."<sup>9</sup>

That same sound, logical reasoning would apply here in Arizona. Thus the distraught father, racing to the scene to save his two sons who were in imminent danger of falling to their deaths from on top of a utility tower, can avail himself of the defense of necessity to the charge of speeding.

## DUI

Is the defense of necessity available to a defendant charged with DUI? Once again look at the scenario where a parent rushes his child to the hospital for emergency treatment and is given a ticket for DUI. The defense of necessity would be available in that instance. The parent reasonably believed that their conduct of driving a 1/2 mile to the hospital was necessary to avoid the greater evil of asphyxiation. The alternative of waiting five to ten minutes for an ambulance to arrive was not a reasonable one. Additionally, the parent did not intentionally, knowingly or recklessly place themselves in a situation where it was probable that they would end up driving under the influence to the hospital. Now some creative prosecutors will argue that a parent of a child with asthma should never drink. Since the parents knowingly drank, and they knew their child had asthma, they were reckless in not foreseeing the possibility that this could occur. Therefore, their recklessness placed them in this position. Nice try, but the standard is not foreseeability. The standard is intentionally, knowingly or recklessly placing oneself in a situation in which it was *probable* that the parent would have to engage in the proscribed conduct.

In this scenario, the parent chose the lesser of two evils. It remains up to the jury to decide if the conduct was justified and therefore excusable. In this DUI set of facts, necessity is a viable defense.

## Escape

Charges of escape are subject to a proper necessity defense. Escape, however, presents a hybrid situation. The case law, both federal and state, has adopted more stringent requirements for the use of a necessity defense in escape cases. The United States Supreme Court, in *U.S. v. Bailey*,<sup>10</sup> set out several standards that must be met before the defendant can successfully avail themselves of this defense. The first is that the defendant must have notified the prison authorities of the threatened evil. Secondly, if after doing this, the defendant does escape, the defendant must offer evidence that justifies their continued absence from custody. A significant part of that offer is evidence that a bona fide effort to surrender or return to custody was made as soon as the danger ended.

If you do have a client who is asserting necessity as a defense to escape, the Arizona cases of *State v. Wolf* and *State v. Mulalley*<sup>11</sup> should serve to give you some guidance.

## Possession of Controlled Substances and Medical Necessity

Before wrapping up this article, a special mention should be made concerning possession of controlled substances and the use of the medical necessity defense. Prior to Proposition 200, this defense was not really a viable one. That position was supported by the decision in *State v. Cramer*.<sup>12</sup> Now, however, because of the decriminalization of certain controlled substances by Proposition 200, this defense may be appropriate in certain limited cases.

In *Cramer*, the Court of Appeals found that, by addressing exceptions and exemptions in detail in the drug statutes, the legislature precluded the use of the necessity statute. Proposition 200 has essentially swallowed up those exceptions and exemptions, opening the way for the use of a medical necessity defense.

## Jury Instructions

Always a source of confusion and grounds for appeals, jury instructions are worth mentioning. The one cautionary flag that should be raised is the one that signals "beware of burden shifting." Whenever affirmative defenses are raised or justification is an issue, the courts tend to give instructions which shift the burden of proof to the defendant. Unlike the justification instruction in *State v. Hunter*,<sup>13</sup> there is no existing necessity instruction. Although in *State v. Diaz*<sup>14</sup> the Arizona Supreme Court did

not reach the issue of whether the rule in *Hunter* applies to duress cases, defense counsel should request a *Hunter* style of instruction. The suggested instructions should look something like the following:

**"It remains up to the jury to decide if the conduct was justified and therefore excusable."**

Conduct by a defendant which would otherwise be an offense is justified by reason of necessity if: 1) a reasonable person would be compelled to engage in conduct similar to or identical to the defendant's, and 2) the person had no reasonable alternative to avoid an imminent public or private injury greater than the injury that might reasonably result from the person's own conduct.

Evidence was presented that raises the defense of necessity. The state has the burden of proving beyond a reasonable doubt that the defendant did not act out of necessity when committing the offense of \_\_\_\_\_.

If the state fails to carry this burden, then you must find the defendant not guilty of the charge.

### Conclusion

The recent codification of the common law defense of necessity clarifies an area of the law which has been marked by confusion and uncertainty regarding its application. But this is not some newly created defense. In reality, it's a sound, time honored exception which prevents the unfair application of our penal statutes to situations where true criminal culpability is lacking. ■

### Endnotes:

1. §19 of the English Draft Criminal Code of 1879 (Royal Commission Appointed to Consider the Law Relating to Indictable Offenses, Report, Cd. No. 2345, app. At 67 (1879))
2. M.P.C. Art. 3 §3.02 Comments p. 9
3. State v Wolf 142 Ariz. 245, 689 P.2d 188 (1984), - State v Mulalley 126 Ariz 278 614 P. 2d. 820 (1980)
4. A.R.S. §13-412(C)
5. M.P.C. Art 3 §3.02 p.10
6. State v. Kinslow 165 Ariz 503, 799 P.2d 844 (1990)
7. State v Belcher 146 Ariz. 380, 706 P. 2d 392 (1985)
8. City of Chicago v Mayer 56 Ill. 2d 366, 308 N.E. 2d 601 (1974)
9. Mayer at 604
10. U.S. v Bailey 100 S. Ct 624 (1980)
11. Wolf supra. Mulalley supra.
12. State v Cramer 174 Az 522, 851 P. 2d 147 (1992)
13. State v Hunter 142 Ariz 88, 688 P. 2d 980 (1984)
14. State v Diaz 168 Ariz 363, 813 P. 2d 728 (1991)



## POST-TRIAL "TAINT" OF JURORS: (Still) Unprofessional Conduct by Prosecutors (Mostly)

By Christopher Johns  
Deputy Public Defender - Appeals Division

*Editor's Note: Some issues simply won't go away. The following article first appeared in for The Defense in January 1992. More than six years later, the problem of post-trial jury tainting is not only still prevalent in Maricopa County, but seems to be growing and spreading. Many prosecutors routinely tell jurors, post-verdict, about inadmissible statements, sanitized priors, pending cases, and other inadmissible and detrimental information. This is done with no discernible purpose other than to make jurors feel bad about their verdict or to influence their actions in future trials. Many judges knowingly allow this to happen, and some even participate. Although we haven't heard any, we're sure that the other side could probably tell a story or two about defenders telling jurors what they were not allowed to hear during the trial, about victims, witnesses, and police officers.*

*Why the renewed interest in doing something (making people feel bad) that we all have known is wrong since kindergarten? Or at least since the State Bar found it unprofessional in Ethics Opinion Number 78-42? Several reasons, perhaps. Some prosecutors have taken the position that the ethics opinion no longer applies, since it was based on the old rules. The County Attorney's internal ethics panel, which used to counsel deputies against making such comments to jurors, will apparently do so no longer, citing "disagreement" in the office about the propriety of this practice. At least one judge has indicated that he has no power to control what happens with the jury once they are excused, even while they are still in his jury room. And at least one other judge has opined that, under the new philosophy of greater jury involvement in the trial process, it has the right to know everything (except potential punishment, of course).*

*It is our position that what was wrong under the old rules and philosophies is still wrong. In an effort to get this issue before the appellate courts, we encourage attorneys to follow Christopher Johns' advice in this article, and file a motion to preclude this conduct whenever there is a possibility of post-trial jury tainting. We also*

(cont. on pg. 7) ☞

urge attorneys to ask some carefully crafted voir dire questions of jurors with prior jury service, in every trial. A proposed motion and suggested voir dire questions are attached to this newsletter. They can also be found on the PD computer system @ s:\pd\_forms\jurytain.t. Please feel free to use them, and let us know if you have any suggestions for improvements. Make a good record on these issues, including the judge's reasoning if the motion is denied or the questions disallowed. And, above all, let us know what happens. The issue must be litigated, if we are ever to succeed in stopping this unprofessional conduct.

We have all had it happen, win or lose, after a jury trial. Following the verdict the judge allows the attorneys to talk with the jury. The purpose is for self-education. Unfortunately, however (especially if there is an acquittal), once you are in the jury room some prosecutors proceed to tell the jury that there was other incriminating evidence that the judge did not allow to be presented at trial, that the defendant had a prior conviction, or that the defendant has other outstanding criminal charges.<sup>1</sup> The prosecutor often adds that the reason the defendant did not testify was because of a prior felony conviction or other pending charges! Is any of the above conduct unprofessional? The answer is yes!

#### Arizona State Bar Ethics Opinions

The Arizona State Bar has opined that it is unprofessional to taint jurors. Prior to 1968, the Arizona State Bar, following the lead of the American Bar Association, took a restrictive view of post-verdict jurors' interviews. ABA Opinion 109 and Arizona State Bar Opinion 200 both reasoned that it was ethically improper to interview jurors post-trial as to how they arrived at a verdict "except in the event of fraud, or a situation where there [had] been a mistake in announcing or recording of a verdict". When the ABA took a more liberal approach in the late 1960's, Arizona also quickly adopted the same position.<sup>2</sup>

That position is fairly summarized by saying that courts began to recognize that irregularities affecting verdicts need to be supported with documentation. Slowly, post-trial interviews came to be accepted for that purpose. Simultaneously, and as importantly, the ABA emphasized the educational aspects of post-verdict juror discussions. The ABA wrote ". . . it is not unethical, in states where it is not illegal, for the purpose of self-education, to communicate in an informal manner with jurors who are willing to talk."

The last pronouncement by the Arizona State Bar Ethics Committee on post-trial jurors' interviews was in 1978 (Opinion No. 78-42 [available upon request from Training]). That opinion, requested by our office, specifically asked the Committee to determine whether it was unprofessional conduct for a prosecutor to approach members of a post-trial jury and tell them: 1) the defendant had a prior conviction; 2) the reason the defendant did not testify was because of a prior conviction; 3) the defendant had other outstanding criminal charges; and/or 4) there was other incriminating evidence that the prosecution was not allowed to present at trial. *The Committee found that each action by the prosecutor was unprofessional conduct under the Code of Professional Responsibility.*

The opinion noted that although the historical trend was toward allowing juror interviews, there was no educational purpose achieved by allowing prosecutors to make statements "presented in such a way which might lead jurors in the future to conclude that defendants have a poor character or a criminal record . . . ."

The 1978 Ethics Opinion relied heavily upon Disciplinary Rule (DR) 7-108(D)<sup>3</sup> as well as Ethical Considerations (EC) 7-10, 7-29 and 7-33 that were part of the Arizona Code of Professional Responsibility. Those rules were replaced in 1985 by the Arizona Rules of Professional Conduct which are based upon the ABA Model Rules of Professional Conduct.<sup>4</sup>

Former DR 7-108 has been replaced by ER 3.5 which has less specific language and arguably now permits any contact as long as it is not prohibited by law. However, additional authority supports the proposition that the conduct described above is unprofessional.

#### ABA Standards for Criminal Justice - The Prosecution Function

The Standards for Criminal Justice were developed by the ABA between the adoption of the Code of Professional Responsibility and the Model Rules. Unfortunately, for whatever reason, they were not included in the Model Rules. The failure to integrate the Model Rules with the ABA Standards is interesting because since their promulgation, the Standards on the Prosecution Function have been cited by literally hundreds of courts.

**"...it is clear that prosecutors who tell jurors about inadmissible evidence are engaging in suspect, if not unprofessional or unethical conduct. . . ."**

(cont. on pg. 8) ☞

Nevertheless, the ABA Criminal Justice Standards remain an important authority to provide guidance to lawyers, the courts and state bars. Standard 5.4(c) of the Prosecutorial Function addressing relations with jurors provides that:

After verdict, the prosecutor should not make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which would tend to influence judgment in future jury service.

Additionally, Standard 5.10 provides:

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

Taken together, along with the prosecutorial duty prohibiting arguing information not in evidence, it is clear that prosecutors who tell jurors about inadmissible evidence are engaging in suspect, if not unprofessional or unethical conduct that should not be tolerated by the defense bar, "professional" prosecutors or judges.

Respect for the jury's verdict is also emphasized by the National District Attorneys Association Standards. Although the standards do not denote what is unethical or unprofessional conduct, they provide guidelines that prosecutors should implement in their offices. Significantly, the NDAA Standards were designed for prosecutors by prosecutors. Standard 27.2(E), that mirrors the former Code of Professional Responsibility, provides that "[t]he prosecutor should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or *embarrassing* the jury in any way which would tend to influence or prejudice judgment in future jury service."

The commentary provided by the NDAA also makes it clear that public comments should not be made that harass or embarrass the jury. "Any comments which tend to influence or prejudice a juror's judgment in any future jury service are *improper*."

### The Courts

As previously discussed, it is generally not unethical (in states where it is not illegal) to communicate in an informal manner with willing jurors for the purpose of self-education.

Federal courts, however, have taken a different view. Federal district courts have a prohibition against post-verdict interviews of jurors unless they are under the supervision of the court. *United States v. Kepreos*, 759 F.2d 961 (1985). The federal view is that permitting unbridled interviews of jurors diminishes confidence in jury verdicts and leads to unbalanced trial results depending upon the relative resources of the parties. *Id.* The latter concern is of particular importance for mistrials.

Unlike our state courts, the federal system is concerned about prosecution attempts to interview jurors in an effort to improve their presentation for retrial. As one court put it, "such conduct represents a serious breach of ethics on the part of the Assistant United States Attorney." *United States v. Puleo*, 817 F.2d 702 (11th Cir. 1987). The government, with its unlimited resources, should not be given the advantage of honing its prosecution of the defendant.

### What's the Issue

The jury is a cornerstone of our nation's judicial system. Attorneys that routinely taint jurors by browbeating them or telling them about inadmissible evidence do a disservice to jurors and to the jury system. Jurors should not be made to feel bad about trying to do the best job they could; and it seems not only discourteous, but unprofessional and unethical for attorneys (particularly prosecutors), to try to prejudice a juror's future service.

### What's the Remedy

In a typical situation, there is no remedy that can be granted by the court that will assist our clients. The issue for defense attorneys is insuring that future jurors are not tainted for jury service. Truly unprofessional conduct should be handled like any other matter that appears to be a violation of the Rules of Professional Conduct. Although the issue of using post-verdict jurors' interviews to assist in re-trying defendants has not been litigated, issues of fairness and jeopardy may arise as they have in some federal cases. Defense counsel should be alert to this issue as well.

One way to prevent the conduct is to file a motion in limine requesting that the conduct be prohibited. This insures that jurors will not be embarrassed or that their future jury conduct will not be prejudiced. The motion need not be complex and can be supported by Opinion No. 78-42. This will insure that the jury pool is free from taint as much as possible. ■

*Update: Since this article's first appearance, Division 1 of the Arizona Court of Appeals has ruled that a judge does have control over how jurors are treated while in recess or after they are excused. In Hirschfeld v. Superior Court, 184 Ariz. 208, 908 P.2d 22 (App. 1995), the Court decreed that "the court has the right and the duty to protect litigants, witnesses, attorneys and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting, or departing." The Court cited Tanner v. United States, 62 F.2d 601 (10th Cir. 1932), which found that the court's authority to protect jurors extended to the courthouse steps after a verdict. Hirschfeld is discussed in the attached Motion to Preclude Improper Jury Contact, and should put to rest the idea that the court has no power to stop improper conduct that may take place in the jury room, hallway, elevator, or on other appurtenances to the courthouse.*

*The National District Attorneys Association's National Prosecution Standards have undergone something of a metamorphosis with regard to the issue of jury tainting since this article first appeared. Standard 27.2(E), cited by Mr. Johns in the article, apparently no longer exists. In the Second Edition of the standards, issued in 1993, post-verdict comments by the prosecutor are apparently only governed by standards relating to comments to the media. In its commentary to Standards 33 through 35, the NDAA stated:*

*"... the prosecuting attorney should be mindful that public comments calculated to harass or embarrass any member of the jury are reprehensible. Any comments which would tend to influence or prejudice a juror's judgment in any future jury service are improper."*

*It would seem that making comments to jurors themselves that harass, embarrass, or influence would be just as reprehensible and improper. However, in a 1998 amendment to the standards, the above language was removed, and a new standard, 35.2, was added. It provides:*

*"The prosecutor has the authority to inform the public of jury verdicts that are clearly contrary to the law and the evidence. The prosecutor also has the authority to inform the public of juror*

**"It would seem that making comments to jurors themselves that harass, embarrass, or influence would be just as reprehensible and improper."**

*conduct that is plainly contrary to the sworn duties of jurors, such as verdicts that were clearly rendered on the basis of bias, prejudice or sympathy, rather than the law and evidence of a case. The prosecutor should not criticize jury verdicts or jury conduct through malice, politics or any other reason extraneous to the proper role of prosecutor."*

*And who is to decide whether a verdict is "contrary to the law and evidence," or "rendered on the basis of bias, prejudice or sympathy"? According to the commentary*

*that follows the above standard:*

*"The appropriate public comments following a criminal proceeding where the highest standards of justice have not been satisfied should be determined according to the prosecutor's own conscience."*

#### Endnotes:

1. In one instance following a mistrial for sexual assault, a prosecutor went so far as to tell the jury that the defendant had AIDS even though it had been ruled inadmissible for the trial. The most frequent occurrence is telling jurors that our clients have prior felony convictions.
2. See Opinion No. 250.
3. DR 7-108(D) provides that "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."
4. The ABA Model Rules were approved by the House of Delegates in 1983. The Model Rules now provide the black letter law on professional conduct and approximately half of the states have adopted them.

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## AMENDMENT TO LOCAL RULES OF PRACTICE FOR THE SUPERIOR COURTS: Rule 2.17 Size of Type

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**By Amy Bagdol**  
**Administrative Coordinator**

All typewritten pleadings, motions and other original papers (including text quotations and footnotes), filed with the clerk shall be in a type no smaller than twelve (12) pitch (12 characters per inch). Those that are printed or otherwise produced with proportional type shall be in a size no smaller than 13 point.

(cont. on pg. 10) ☞

Okay, why is she telling ME this? Because as of June 1, 1998, our Superior Court pleadings (including standard motions, subpoenas, jury instructions, etc.) will not be accepted by the clerk's office unless we make the print one point larger than what we're used to. This is 12-point type; this is 13-point type. Not much difference, but in order to comply with this amendment, we need to convert standard documents to 13 point. If you don't know how to change your point size, call the Help Desk at 506-6198.

This is nothing new to Appeals. Non-capital case briefs must be printed in 14-point type, with a word count not to exceed 14,000. Replies may not exceed 7,000 words, including footnotes and quotations. Special Actions and motions in the Court of Appeals are acceptable in any point you like (higher than 12), but may not exceed 10,500 words if printed in scalable font. So, 13 point is acceptable for the Court of Appeals or the Arizona Supreme Court.

Velia Ceballos and Sherry Pape have been working diligently to update our standard motions. They have cleaned and converted most of your favorite motions and letters to 13 point. You may copy these motions, as well as the new caption format, from each of the shared drives (S:\pd\_forms). If you would like to add any letters or standard motions we've missed to this drive, please contact Sherry (506-3036) or Velia (506-8332). ■

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## ARIZONA ADVANCE REPORTS

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By Terry Adams  
Defender Attorney - Appeals

### *State v. Ysea* 266 Ariz. Adv. Rep. 3 (SC, 4/2/98)

Ten years after his guilty plea to manslaughter, the defendant sought to have the plea set aside due to ineffective assistance of counsel. He pled guilty to avoid the death penalty because his attorney advised him that his prior conviction of solicitation to commit aggravated assault would be an aggravating circumstance that would require a death sentence. The aggravating factor has to be a prior involving the use or threatened use of violence. The court points out that the sentencing judge must look at the statutory definition of the crime to determine this. The definition of solicitation, it is not an aggravating factor. This was so under the prevailing law at the time of the plea. A competent lawyer would have realized this and therefore he should be allowed to withdraw his plea.

### *State v. Foster* 266 Ariz. Adv. Rep. 8 (CA 1, 4/7/98)

The defendant was charged with two counts of aggravated assault, count I for intentionally placing someone in reasonable apprehension of immediate bodily harm and count II for intentionally or *recklessly* causing physical injury. The trial court *sua sponte* gave disorderly conduct instruction for both counts. The court of appeals held that disorderly conduct is not a lesser included of aggravated assault under § 13-1203 (A)(2) which includes the element of reckless. Therefore the conviction as to count II was set aside.

### *State V. Guytan* 266 Ariz. Adv. Rep. 10 (CA 1, 4/7/89)

The defendant was convicted of first degree murder, drive-by shooting and two counts of aggravated assault. After the jury was selected the prosecutor filed an allegation that the offenses were committed to promote, further or assist criminal conduct by a criminal street gang.(§13-604(T)). The court found that this was untimely and although it did not deny the defendant a fair trial, he was improperly subjected to enhanced punishment. He was entitled to know before trial the full extent of the potential punishment that he faced. The court also discusses and affirms the manner in which an alternate juror was substituted. A natural life sentence is constitutional and was properly imposed.

### *State v. Cohen* 266 Ariz. Adv. Rep. 16(CA 1, 4/7/98)

Police served a search warrant by approaching a closed screen door of a home, knocked, announced, waited "maybe a second, maybe less," then entered and secured the defendants. The ensuing search revealed 180 pounds of marijuana. The trial court suppressed the dope because the cops violated the knock and announce statute (§13-3916(B)). The court of appeals affirmed, holding that the announcement occurred virtually simultaneously with the entry. The court relies on *St. v. LaPonsie*, 136 Ariz. 73, that holds, absent exigent circumstances, a three to five second wait following announcement is unreasonable.

### *State v. Cota* 266 Ariz. Adv. Rep. 32 (SC, 4/8/98)

The defendant was observed buying marijuana from his co-defendant. They both were indicted on one count of sale and one count of transfer of marijuana. The trial court directed out the sale as to Cota. The state argued that he was an accomplice to his co-defendant for transfer, and requested and got an accomplice instruction. The jury convicted. The Supreme Court reversed holding that one cannot transfer something to oneself. ■

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## BULLETIN BOARD

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### *New Attorneys*

Nine attorneys will begin attorney training on May 26.

**Margi Breidenbach** graduated last August from ASU's College of Law. Margi has been with us since 1991, when she became one of our first Client Service Coordinators. She was a clinical intern with the office last summer.

**Patricia Caldwell** comes to the office from the Navajo County Public Defender's Office where she has been employed since 1995. Patricia received her Juris Doctorate from Willamette University College of Law in Oregon where she is also licensed to practice law. She holds a B.A. in Political Science from ASU.

**Mary Goodman** worked as a R38(e) clinical intern with the office before obtaining her degree from ASU College of Law. Her undergraduate degree is from Ohio State University, and she is also a Certified Public Accountant.

**Candice Shoemaker** is a graduate of Capital University Law School in Columbus, Ohio. While in law school she interned in the school's legal clinic, and externed with the Ohio Supreme Court.

**Bruce Walker** served a Judicial externship with Stephen McNamee of the U.S. District Court while in law school. He received his J.D. from ASU College of Law and his B.S. in Economics from ASU. Since graduation, he has been Judge Araneta's bailiff.

**Robert Zelms** graduated from ASU's College of Law last August. He has clerked for Franklin and Mendoza and for Bruce Blumberg on criminal matters.

Law Clerks **Jeffrey Force**, **Christopher Flores**, and **Nathaniel Carr** will become Defender Attorneys effective May 26.

### *Attorney Moves/Changes*

**Ingrid Miller** (Group D) and **Nancy Hines** (Expedited Drug Court), are transferring to our Durango Juvenile office. **Karen Kaplan** (Group D) will be taking over for Nancy Hines in Drug Court. **Susan White** will be moving from Mesa Juvenile to Dependency.

**Yvette Gray** (Group B), will be leaving us in June to join the Phoenix City Prosecutor's office.

**Darrow Soll** will be leaving the office for private practice with the firm of Steptoe and Johnson on June 8.

### *New Support Staff*

**Nick Alcock** will become a law clerk for Group C on May 26. This May he received both his J.D. from ASU College of Law and his M.B.A. from ASU College of Business. His undergraduate degree is from University of California - Santa Barbara in Political Science. Nicholas was a volunteer law clerk for Group C last year.

**Dionja Dyer** will join the office as a law clerk for Group A on June 10. Dionja graduates from Harvard Law School in June. She participated in the summer volunteer extern program with our office this past summer. She served as valedictorian of her graduating class from Virginia State University, earning her B.A. in Political Science.

**Marcus Keegan** joins the office June 1 as a Client Service Coordinator. For the past two years, Marcus has been a Maricopa County Deputy Adult Probation Officer. He has a Bachelor's degree in Criminology from Indiana University of Pennsylvania.

**John King** is the new investigator for Group B. John served 20 years in the Air Force, including 12 years with OSI. John holds a B.S. in Vocational Education Studies. He most recently worked as a special investigator for the Arizona Supreme Court Commission on Judicial Conduct, following periods as an investigator for the Arizona Department of Insurance and Real Estate. He joins the office on May 26.

**Rodney Mitchell** became a Law Clerk in Group B effective May 26. He obtained his B.S. in Political Science from the U.S. Naval Academy before going on the receive his J.D. from ASU College of Law. He was a Rule 38(e) clinical intern with this office.

### *Support Staff Moves/Changes*

**Faye Peterson**, Legal Secretary, left Group C for a position with Pinal County effective May 8.

**Rose Salamone**, a twelve year veteran of this office, will be departing on May 29 to join Blue Cross/Blue Shield. Rose began her career with us as a Legal Secretary and has been our Financial Services Administrator for the past several years. Her extraordinary service as a key administrative employee will be deeply missed by all. We wish her the very best in her new career endeavors.

**Linda Shaw**, Legal Secretary for Group A, will become Group A's Client Services Coordinator, effective June 1. Linda received her Bachelor's degree in Business Administration from Boston University and her Master's degree in Educational Psychology from the University of Puerto Rico. ■

## April 1998 Jury and Bench Trials

### Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/19-4/6	Ellig/ McAlister/ Neus	Dougherty	Martinez	CR 95-07070 Murder First Degree/F1; Burglary First Degree/F1; Theft/F3; Theft of a Credit Card/F5	Guilty	Jury
3/24-4/10	Reece/Farney	Cole	Charnell	CR 95-08102 Murder Second Degree/F1; Misd. Assault/M1	Not Guilty of Murder; Guilty of Lesser Included Negligent Homicide (Non- Dang., Non-Repetitive) Guilty of Assault	Jury
3/30-4/2	Green	Galati	Sigmund	CR 97-13237 Aggravated Asslt./ F3D CR 97-11411 Aggravated Asslt./ F3D Shooting into Residential Structure/ F2D	Guilty	Jury
4/6-4/7	Carter	Dunevant	Lawritson	2 Cts. Agg. DUI/F4 with 2 historical priors	Not Guilty of Agg. DUI; Guilty of Lesser Included Misdemeanor DUI-2 Cts.	Jury
4/6-4/7	Townsend	Schneider	Schesnol	CR 97-03111 2 Cts. Agg. Asslt/F2 & F5	Not Guilty 1Ct. Agg. Asslt./ F2 Guilty 1 Ct. Agg. Asslt./ F2	Jury
4/6-4/7	Leal	Padish	Hernandez	CR 97-07614 Criminal Damage/F6	Guilty	Jury
4/6-5/1	Hernandez	Cole	Imbordino	CR 97-02529A Murder First Degree/F1; Armed Robbery/F3	Guilty	Jury
4/9-4/16	Porteous/ Robinson	Chavez	Hernandez	CR 97-07950 POM F/S/F4; POM Trns/F3; PODP/F6	Not Guilty	Jury
4/15-4/16	Lehner/Rock	Crum	Shrev	CR 97-02454A-MI Misd. DUI/MI	Hung Jury	Jury
4/16-4/23	Kent/ Robinson	Baca	Skibba	CR 97-13930 Agg. Asslt. Dangerous/F3; 2 Cts. Endangerment, Dangerous/F6	Guilty of Agg. Asslt. Not Guilty on 2 Cts. of Endangerment	Jury
4/28-4/29	Ryan/Clesceri	Ellis	Rea	CR Non-Res. Burglary/F4; Theft/F5 with 2 priors	Guilty	Jury

(cont. on pg. 13) ☞

## Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/26-4/02	Landry/ Erb	Sargeant	Sandler	CR 97-04689 3 Cts. Sexual Aslt./F2 Kidnapping/F2 Agg. Aslt./F3D	Not Guilty	Jury
4/01-4/02	Liles/ Ames	Bolton	Kalish	CR 97-13188 2 Cts. Forgery/F4	Ct. 1 - Not Guilty Ct. 2 - Hung (7-1 Acquittal) -- has since been Dismissed by State	Jury
4/02-4/08	Agan	Wilkinson	Wendell	CR 97-02613 Drive by Shooting/F2D	Guilty	Jury
4/02-4/09	L. Brown	Schwartz	O'Connor	CR 97-10339 Kidnapping/F2 Child Abuse/F4	Not Guilty	Jury
4/07-4/09	Walton/ Erb	Hilliard	Williams	CR 97-08643 Agg. DUI/F4 w/one prior	Hung on Agg. DUI -- Guilty of lesser included Driving on a Suspended License	Jury
4/7-4/14	Park/Castro	Arellano	Stooks/ Ewing	CR 97-02767B Traffg in stolen prop./ F2; Residential Burg. 2°/ F3;	Guilty on both counts	Jury
4/16-4/21	Landry	O'Toole	Newell	CR 96-12384 Agg. DUI/F4	Guilty	Jury
4/20-4/23	Peterson	Wilkinson	Ainley	CR 97-02646 Theft/F4	Not Guilty of Felony Theft; Guilty of lesser included Theft, a Class 1 Misdemeanor	Jury
4/23-4/25	Navidad/ Ames	Dunevant	Rahiloo	CR 96-07782 Criminal Damage/F5 w/prior	Not Guilty	Jury

## Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
3/26-4/2	Shell	Keppel	Fuller	CR 97-91993 Burg/F3	Not Guilty	Jury
4/8- 4/9	Silva & Lorenz	Ellis	Stelly	CR 97-95577 4 cts. Agg DUI/F4	Guilty	Jury
4/9-4/16	Klobas	Keppel	Flader	CR 97-92132 Disord. Cndct/F6D	Mistrial	Jury
4/15-4/17	Whitfield/ Beatty	Aceto	Fuller	CR 97-95479 CR98-90799 Shoplift/F6 Traffick Stolen Prop/F2	Guilty	Jury
4/16-4/17	Devany	Ellis	Brenneman	CR 97-94586 1 Ct. Attpt/Com Arm Robb/ F3	Guilty	Jury

(cont. on pg. 14)

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
4/22-4/23	Whitfield	Keppel	Bennink	CR 97-95429 Flt Frm Pur Law Enforce. Vehicle/F5	Hung Jury (6 Guilty, 2 Not Guilty)	Jury
4/23-4/27	Schmich/ Moller	Aceto	Rizer	CR 97-94383 1 Ct. Burg 2/F3	Guilty	Jury
4/23-4/24	Murphy & Nermyr	Ellis	Abuchon	CR 97-94735 Poss Meth/F4 PODD/F6	Guilty	Jury
4/24-4/24	Shell	Melton	Drexler	TR 97-00351 DWI/M1	Not Guilty	Jury
4/28-4/29	Mackey	Aceto	Craig	CR 97-94847 Poss Meth/F4 PODP/F6	Guilty	Jury

## Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/23-4/16	Stazzone & Kaplan/ Bradley	Kamin	Lynch	CR 96-04955 Murder 1° 4 Cts. Armed Robbery/ F2D	Not Guilty Murder 1° & 2 Cts. Armed Robbery Guilty 2 Cts. Armed Robbery Dang.	Jury
3/30-4/1	Carrion & Wray	Gerst	Boyle	CR 97-08902 2 Cts. Agg. DUI/F4	Guilty on both counts	Jury
3/30-4/2	Billar	Katz	Meyer	CR 97-06414 G/T Vehicle/ F3	Guilty	Jury
4/1-4/2	Hoff/ Barwick	Nastro	Keyt	CR 96-04786 2 Cts. Agg. Assault/F3D	Dismissed with prejudice	Jury
4/7-4/7	Carrion	Katz	Boyle	CR 96-01963 2 Cts. Leaving the Scene of an Injury Accident w/Death/Injury/F3	Count 1 Guilty Count 2 Dismissed	Jury
4/7-4/9	Hoff/ Bradley	Chavez	Pacheco	CR 97-04369 PODD/F4; POM/F6 PODP/F6	Hung jury	Jury
4/22-4/28	Willmott	Comm. Hyatt	Coury	CR 97-13217 PODD for Sale/4F POM/F6 Resisting Arrest/MIW	Guilty on all Counts	Jury
4/27-4/29	Billar	Katz		CR 97-05870 Possession Crack Cocaine/ F4 CR 97-11303 Possession Crack Cocaine/F4 Possession Drug Paraphernalia/ F6	Guilty	Jury

(cont. on pg. 15)

## DUI Group

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
4/27-5/4	Jung	D'Angelo	Cappellini	CR97-03857 2 Cts. Agg Assault-Dang 4 Cts. Endngmnt-Dang.	Guilty	Jury
4/27-4/30	Timmer	Chavez	Lawritson	CR97-08715 2 Cts. Agg DUI	Guilty	Jury

## Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
4/13-4/23	Hughes/ Abernethy	D'Angelo	M.Barry	CR 95-11664 Murder 1 <sup>st</sup> Degree/ F1D	Guilty	Jury
4/13-4/20	Parzych	Araneta	J.O'Neill	CR 96-93528 Aggravated Assault/ F4	Guilty	Jury
4/9-4/13	Funckes	Wilkinson	S.Anthony	CR 97-14856 Aggravated Assault/ F4 Aggravated Robbery/ F3	Guilty w/2 priors on parole	Jury
4/14-4/17	Baeurle	Hilliard	T.Clarke	CR 97-10624 Fraud.Schs.& Artifices/ F2	Hung jury (5-3 NG)	Jury
4/16-4/28	Miller	McDougall	M.Brnovich	CR 96-12239 (B) Ct.1:Burg.1st Deg./ F2D Ct.2:Armed Rob./ F2D Ct.3:Armed Rob./ F2D Ct.4:Kidnapping/ F2 Ct.5:Kidnapping/ F2	Guilty of Less.Incl. Burg.2d Deg. Guilty of Less.Incl.Robbery Guilty of Less.Incl.Robbery Guilty Guilty	Jury
3/24-4/1	Ivy	Yarnell	J.Schesnol	CR 97-02397(A) 4 Cts.Att.Armed Robbery/ F3D 1 Ct.Armed Robbery/ F2D	Guilty 4 Cts. Armd Rbbry  Guilty of Less.Incl.Att.Armed Robbery	Jury
3/20-4/1	Hughes/ Abernethy	Dunevant	M.Barry	CR 97-00750(A) Murder 1 <sup>st</sup> Degree/ F1D Conspiracy to Commit Armed Robbery/ F2 Burglary 1 <sup>st</sup> Degree/ F2	Hung Jury (10-2 Guilty) Murder; Directed Verdict Armd Rbbry; Hung Jury (10-2 Guilty) Burgl.	Jury
4/7-4/14	Patton/Apple	Arellano	Stooks- Ewing	CR 97-02767 Ct.1: Burglary, 2 <sup>nd</sup> / F3N Ct.2: Trafficking/ F2N	Guilty	Jury
4/23-4/29	Patton	Kamin	Petrowski	CR 97-06776 (B) SODD (Cocaine)/ F4	Guilty	Jury
3/24-4/2	Patton/Apple	Arellano	J.Davis	CR 97-01424 Agg.Asslt. on P.O./ F5	Guilty	Jury

By \_\_\_\_\_  
[PD]

## MEMORANDUM OF POINTS AND AUTHORITIES

### The Problem

It has become common in Maricopa County for attorneys and judges to meet with jurors immediately after they are excused. These meetings generally occur in the jury deliberation room, and often include other interested parties, such as the prosecutor's "investigator," who is usually the primary law enforcement witness for the prosecution.

These meetings can be very beneficial exchanges of information between attorneys, judges and jurors, and have the potential to enhance the respect of jurors toward the judicial system. However, they also have the potential to seriously erode this respect. This happens when attorneys, judges, or others disclose to jurors information, not admitted at trial, that embarrasses jurors or causes them to second-guess their decision.

A typical scenario is as follows: The jury renders a not guilty verdict. The prosecutor or the judge then asks the jurors if they would have found differently if they had known that the defendant had been previously convicted of similar crimes. The usual response from the jury is shock and dismay that what appears to them to be vital information was withheld from them. Sometimes the attorneys or the judge will try to explain why the information was inadmissible, sometimes not. Regardless of whether an explanation is made, the jurors leave the court believing that they have been deceived.

It is very likely that these same jurors will be called for jury service again. In fact, this is so common that one of the standard questions asked of jurors during jury selection is whether they have previously served on a jury. Usually, over half of the jurors on a panel will answer this question affirmatively. These returning jurors will remember that information was withheld from them the last time, and will advise their fellow, first-time jurors that they may not be hearing all of the evidence. The question then becomes whether jurors will follow the court's instructions to base their decision on the evidence presented, or whether they will be influenced by suspected facts that they assume are being withheld.

In addition, these jurors can be expected to tell their friends and relatives that information was withheld from them by the lawyers and the court. It is not likely that they will explain why the information was inadmissible under the rules of evidence, even if this was explained to them.

The ultimate result of continuous and unbridled disclosure of this type of information is a tainted jury pool, an erosion of respect for the court and the judicial system, and an adverse impact on the administration of justice.

#### Ethics Opinion 78-42

This is not a new or uncommon problem. Virtually every attorney in the Public Defender's Office has experienced it. It was occurring so regularly that, in 1978, a deputy public defender requested an ethics opinion from the State Bar on the issue. The resulting opinion, Number 78-42 (copy attached), found that it was unprofessional conduct under the Code of Professional Responsibility for a prosecutor to inform a jury, in a case where the defendant did not testify, that:

- 1) The defendant has a prior conviction.
- 2) The defendant has a prior conviction, and that is the reason that he did not testify.
- 3) The defendant has other outstanding criminal charges against him.
- 4) The defendant has other outstanding criminal charges against him and that is the reason that he did not testify.
- 5) There is other incriminating evidence that the prosecution was not allowed to present at trial.

The opinion was based on DR 7-108(D) and EC 7-29, which provided that "After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases." Since the Committee could discern no legitimate purpose in disclosing to jurors inadmissible, denigrating information about the defendant, it found that it was unethical to do so.

Opinion Number 78-42 was followed, for the most part, for several years. However, in recent years the problem has begun to recur. In 1984, the Arizona Rules of Professional Conduct replaced the Code of Professional Responsibility, and the specific provisions of DR 7-108(D) and EC 7-29 were not duplicated in the new rules. Some prosecutors in the Maricopa County Attorney's Office have taken the

position that this means that they are now permitted to tell jurors about inadmissible evidence, and they have been doing so with regularity. Some judges have also taken this position and are themselves making comments to jurors that were determined to be unethical in Opinion 78-42.

#### Arizona Rules of Professional Conduct

Despite the change in the ethical rules, the conduct is still improper. Under ER 8.4, it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Conduct which harasses or embarrasses jurors, denigrates their verdict, or makes them feel as if they were duped by the court or the judicial system, is prejudicial to the administration of justice. These jurors will tell others about their experience, and will likely return to jury service again themselves, tainting the jury pool and making it more likely that future verdicts will be influenced by what tainted jurors assume was withheld from them. The fact that government employees, with the approval and even participation by judges, are allowed to harass and embarrass jurors, will diminish jurors' respect for the judicial system and make them less willing to serve in the future. All of this is extremely prejudicial to the administration of justice.

ER 4.4 provides that a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person. The Code Comparison which follows ER 4.4 refers to DR 7-108(D), which was the basis for Opinion 78-42, refuting any argument that the new rules were intended to repeal DR 7-108(D). As the Ethics Committee noted in Opinion 78-42, there is no discernable useful purpose for disclosing inadmissible evidence to jurors after they have reached their verdict, except to embarrass, harass, or influence future action. Though the rules have been changed, the basis for Opinion 78-42 remains, and the conduct is still unethical and improper.

#### Arizona Code of Judicial Conduct

The conduct also violates the Code of Judicial Conduct. Under Canon 2(A), a judge shall "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge allowing or joining in, essentially, defendant-, witness-, or victim-bashing does not promote public

confidence in the integrity or impartiality of the judiciary. In fact, this practice tells jurors that, despite what the judge said during the trial about the court's impartiality, the judge did favor one side. Thus, the judge was not only partial, but deceptive as well.

#### ABA Standards

The Third Edition of *The American Bar Association Standards for Criminal Justice: The Prosecution Function*, Chapter 3-5.4(c), specifically addresses the issue of communication with jurors. It states that, "after discharge of the jury from further consideration of the case, a prosecutor should not intentionally make comments to, or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which would tend to influence judgment in future jury service."

#### The Court's Duty to Protect

The Court has the right and the duty to protect litigants, witnesses, attorneys and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting, or departing. *Hirschfeld v. Superior Court*, 184 Ariz. 208, 211, 908 P.2d 22, 25 (App. Div. 1 1995). Misbehavior toward any person in attendance upon the court lessens the dignity and authority of the court and is punishable as a contempt of court. *Id.*, at 209, 23. In *Hirschfeld*, the Arizona Court of Appeals relied on cases concerning misbehavior that occurred while court was in recess, including following a verdict. Included was *Tanner v. United States*, 62 F.2d 601 (10th Cir. 1932), in which a dissatisfied attorney berated a juror for the jury's decision as the juror was descending the courthouse steps. The court noted that it had a duty to protect jurors, even outside the courthouse after a verdict, on the ground that the juror would be called in subsequent cases. The court determined that, if it did not so protect jurors, "they would be reluctant to do their duty in the future." 62 F.2d at 602.

The conduct complained of in this motion does not usually rise to the level of that condemned in *Tanner* or *Hirschfeld*, although it has come close. But there is little difference in the mind of a juror between being blatantly harassed for reaching the "wrong" verdict, and being politely told of alleged evidence that would have caused the juror to reach a different verdict, if he had only known. The result is an erosion of

faith and respect for the judicial system, a reluctance to return for service in the future, and the likelihood of tainting of the jury pool. The court and all of its officers, including the attorneys, have a duty to protect jurors from this misbehavior.

Conclusion

The practice of disclosing inadmissible or unoffered evidence to jurors after they have reached a verdict is improper and unethical. It is detrimental to the administration of justice. Luckily, it is quite easily resolved. The Court should order all interested parties to refrain from making comments to, or asking questions of jurors that tend to embarrass or harass them, or to cast doubt about their decision.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

MARICOPA COUNTY PUBLIC DEFENDER

By \_\_\_\_\_  
[PD]

OPINION NO. 78-42

December 13, 1978

FACTS:

The Committee has received a request from a county office of the Public Defender for an opinion concerning the propriety of post-trial conversations between prosecutors and members of the jury. The request reveals that, in discussions with various prosecutors, the prosecutors have indicated that they believe it proper to reveal facts dealing with the defendant's background to jury members.

The hypothetical posed by the inquiring attorney assumes that the jury has returned a verdict in a criminal case in which the defendant did not testify. The prosecutor then approaches members of the jury and informs them that:

- (1) The defendant has a prior conviction.
- (2) The defendant has a prior conviction, and that is the reason that he did not testify.
- (3) The defendant has other outstanding criminal charges against him.
- (4) The defendant has other outstanding criminal charges and that is the reason that he did not testify.
- (5) There is other incriminating evidence that the prosecution was not allowed to present at trial.

The Committee initially declined to respond to the inquiring attorney's request because our Statement of Jurisdictional Policies precludes us from issuing opinions "involving the questioned ethical propriety of past or continuing conduct of a member of the State Bar upon the request of another individual Arizona attorney". However, subsequent to the original request, the Committee was instructed by the Board of Governors to issue an opinion. Accordingly, we do have jurisdiction under paragraph 3 of the Committee's Statement of Jurisdictional Policies (see page 9 of October, 1978, issue of Arizona Bar Journal).

QUESTION:

"Under each of the above hypotheticals, is the prosecutor's conduct unprofessional as proscribed by the Code of Professional Responsibility?"

CODE PROVISIONS INVOLVED:

Canon 7. A lawyer should represent a client zealously within the bounds of the law.

EC 7-10. The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-29. To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior

to trial or with jurors during the trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-33. A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdicts solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

DR 7-108. Communication with or Investigation of Jurors.

\*\*\*\*\*

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

\*\*\*\*\*

OPINION:

All of the hypotheticals posed by the inquiring attorney differ only in degree. This Committee therefore feels that a summary of the relevant provisions of the Code of Professional Responsibility is an appropriate starting point for addressing the inquiries that have been made. It appears to us that the only express ethical constraints imposed by the Code upon post-trial communications with trial jurors by a lawyer connected with the case are the following:

- (1) The lawyer or his agent must refrain from making comments to the juror that are calculated or have a tendency to harass or embarrass the juror or to influence actions of the juror in future jury service;
- (2) The lawyer or his agent must act considerately and with deference to the personal feelings of the juror; and
- (3) The lawyer or his agent must treat the juror with courtesy and consideration and avoid the infliction of needless harm.

In this light, we reaffirm our Opinion No. 73-35, declaring that a lawyer may, after the trial, comment to or interrogate a juror if his purpose is self-education in his trial techniques or preparation for

the retrial of the same cause, provided that the lawyer complies with the restrictions on such activity imposed by the Code of Professional Responsibility. In addition, we feel it to be proper for the trial lawyer to question jurors, within limits, for evidence of jury misconduct. However, these are not the issues before us. Rather, we must concern ourselves with the propriety of specific statements made by a prosecutor to a juror.

The office of public prosecutor imposes a special trust obligation upon the women and men occupying it, for the manner in which the duties of this office are discharged is of first importance. In the public mind the entire administration of justice tends to be symbolized by the drama inherent in the criminal law. Therefore, the freedom granted elsewhere for partisan advocacy must be severely restricted if the prosecutor's duties are to be properly performed. The prosecutor fulfills a dual role, not only furnishing the adversary element necessary for the performance of our criminal justice system, but also being possessed of governmental powers that are pledged to the accomplishment of only one objective, that of meting out impartial justice. Where the prosecutor is recreant in fulfilling his duty to the trust implicit in his office, he undermines confidence in his profession, in government, and in the very ideal of justice. 44 A.B.A.J. 1159, 1218 (1958).

Historically, it has been considered improper for an attorney to approach jury members, even after a verdict. See, e.g., our Opinions Nos. 200 and 250; H. Drinker, *Legal Ethics* 84 (1953). However, there has been a relaxation in this rule, and the attorney may now interrogate jury members for certain purposes. The Committee believes, however, that when those purposes are not served (and we can see no beneficial educational value in the statements contained in the hypotheticals posed), the attorney may not approach members of the jury subsequent to the trial. More specifically, we are of the opinion that the dictates of EC 7-29 control this situation: "After the trial, communication by a lawyer with jurors is permitted so long as he refrains from . . . making comments that tend . . . to influence actions of the juror in future cases." Since we fail to discern any useful purpose that is served by allowing comments of the types mentioned in the hypotheticals, we believe that the spirit, if not the letter, of EC 7-29 makes it ethically improper for a prosecutor to make statements of these kinds to jurors. Statements presented in a way which might lead jurors in the future to conclude that defendants have a poor character or a criminal record are a violation of this Ethical Consideration. As the United States Supreme Court noted long ago:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907).

We would like to make a special comment on Question No. 5 concerning incriminating evidence that the prosecution was not allowed to present. We agree that a lawyer who is dissatisfied with the rules of evidence or any judicial exclusionary rule owes it to the public to propose reforms, but making bald statements to jurors is not the appropriate course to follow. Rather, these comments should be directed to the appropriate section of the State Bar or to the Legislature.

We, accordingly, must answer the question posed in the affirmative.

### **Voir Dire Questions About Prior Criminal Jury Service**

To avoid poisoning the whole panel, these questions should be asked individually, out of the presence of other potential jurors. Otherwise, you run the risk of one potential juror telling the others that information was withheld from the jury in the prior trial, which is exactly what you are trying to avoid.

Even individually, the questions must be carefully crafted, to avoid suggesting to a potential untainted juror that information may be withheld.

1. How do you feel about your prior jury experience?
2. Did your prior jury experience have any effect on your level of respect for:
  - a. The criminal justice system?
  - b. Judges?
  - c. Prosecuting attorneys?
  - d. Criminal defense attorneys?
  - e. People accused of criminal offenses?
3. How and why?
4. After the previous trial, did you have any conversations with the judge, attorneys, or anyone else involved with the case?
5. What do you remember about those conversations?
6. How did those conversations make you feel?
7. What did you tell your friends and relatives about your prior jury service?
8. Do you think there is anything about your prior jury service that might influence the way you would conduct yourself as a juror in this case?
9. Is there anything about your prior jury service that you think the judge or attorneys in this case should know? That you would want to know if you were one of the parties in this case?

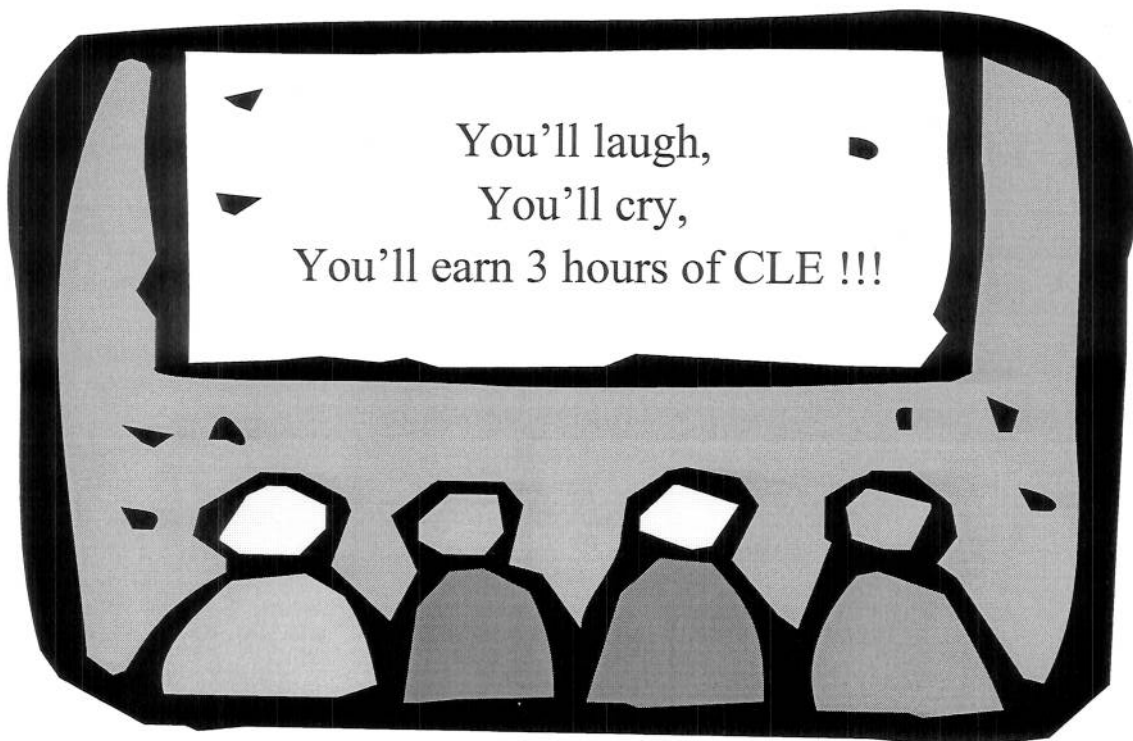
#### **If juror remembers any tainting conversations:**

10. Did anyone explain to you why the information was not presented? Were you satisfied with the explanation?
11. How did you feel about your verdict after you found out that there was information that was not presented?
12. Because some information that you felt was relevant was not presented in your previous trial, will you suspect that this is happening in this case?
13. Would you tell the other jurors, based on your prior experience, that there may be information that is not being presented? What if the jury was deadlocked and you thought this might help break the impasse?
14. Do you think that you would be able to decide this case on the evidence presented, without speculating on what information may not have been presented?

MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE  
PRESENTS

## "ETHICS 1998"

An Interactive Video Presentation



Friday, June 26, 1998  
1:00 pm - 4:15 pm  
Board of Supervisor's Auditorium

# INSIDE ADDITION

The Insider's Monthly

May 1998

## COMPUTER CORNER

By Susie Tapia  
Information Technology

### Memories....

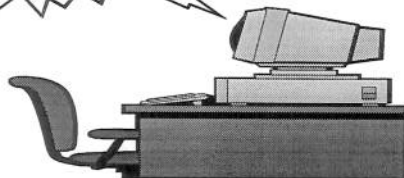
No it's not the theme from "Cats"! We're talking about how your PC uses it. Think of the memory in your PC as a pie, and each window you open is a piece of the pie. The more things you open, like GroupWise, Vax, Internet, In Box, Out Box, Send Message, WordPerfect documents, etc. the smaller the piece of pie. Your PC loves large chunks of pie, it satisfies the appetite better and nobody like to share anyway. So, translate that into. . . when your PC starts slowing down, ask yourself how many windows do I have open? How small are those pieces of pie?

### WordPerfect Default Font

As handed down by the courts the default font is to be changed to a 13 point or larger font. To set your default font in WordPerfect use these steps:

1. Format
2. Document
3. Initial Font
4. Select the type and size
5. Place a check in "Set as Printer Initial Font"
6. Choose Ok
7. Close WordPerfect
8. Open WordPerfect and check the default listed on the power bar.

13 FONT!!



## Internet Tips

Having trouble finding something on the web? Join the 57 million other users (at last count). To narrow your search results, try using some of the following examples provided from *InfoSeeks* search tips page:

ruby slippers	ruby and/or slippers, preferring pages with the phrase ruby slippers
"ruby slippers"	the word ruby next to the word slippers
+ruby slippers	ruby, maybe slippers
+ruby +slippers	both ruby and slippers in the document, not necessarily next to one another
+Dorothy -Hamill	the name Dorothy; pages containing Hamill are ranked lower
Dorothy Gale	the name Dorothy Gale (Remember to capitalize proper nouns)
Dorothy, Toto	the name Dorothy and the name Toto keep in mind...

If you are using a plus (+) or minus (-) search operator, there is a space before the operator, but no space between the operator and the search term.

Example: +Dorothy +Kansas

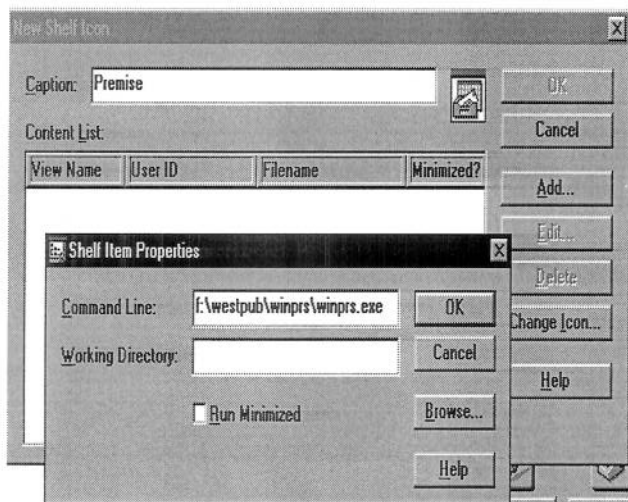
Put a plus sign (+) before the first term as well.  
Example: +ruby +slippers

Many other helpful hints are found on any of the search engines available. When all else fails to produce satisfying results, choose another search engine, they each can produce different results.

### Premise & Shepards Short Cut Icons

To add a Premise or Shepards icon to your GroupWise shelf use the steps listed here.

1. Choose File, New from the pull down menu on GroupWise.
2. Type in the Caption as either Premise or Shepards.
3. Click Add.
4. For Premise type the following in the command line: f:\westpub\winprs\winprs.exe  
For Shepards type the following in the command line: f:\shepards\shepards.exe
5. Click OK on the Properties box.
6. Click OK on the Shelf icon box.



If you need assistance contact the Help Desk at x66198.



*Happy Computing!*

### TRAINING NEWS

By Lisa Kula  
Training Administrator

MC PD training classes have been set for the month of June. *Professional Excellence for Secretaries* will be offered on a repeating basis, so all secretarial staff will have an opportunity to attend without adversely affecting coverage. The class on Team Building will include a special showing of CRM Films' "Team Building: What Makes a Good Team Player?". This film is specifically designed for those employed in government service. To attend either class, please contact Lisa Kula.

#### *Professional Excellence for Secretaries*



Thursday June 18, 1998  
9:00 am - 12:00 pm  
Training Facility  
Luhrs Arcade #10

#### Team Building



Tuesday June 30, 1998  
2:00 pm - 4:00 pm  
Training Facility  
Luhrs Arcade #10

## PERSONNEL PROFILE

**Fran Garrison**  
Litigation Assistant, Group A

**F**ran moved from Newnan, Georgia to attend ASU in 1990. After graduating from ASU and paralegal school, she came to the office as an intern for Russ Born. She loves baseball (she's a Braves fan of course), hiking, and southern food. She hopes someday to attend law school.

**What is your idea of perfect happiness?** Peace of mind, being debt free.

**What is your greatest fear?** Boredom, being forced to wear pantyhose during the summer.

**Which living person do you most admire?** My mom, Dr. Laura.

**Which living person do you most despise?** I don't despise anyone, it's a waste of energy.

**Who are your heroes in real life?** My mother and the person who invented grits.

**Who is your favorite hero of fiction?** Scarlett O'Hara.

**What is the trait you most deplore in yourself?** My inability to get a decent tan.

**What is the trait you most deplore in others?** Selfishness, bad driving.

**What is your greatest extravagance?** Expensive shoes.

**On what occasion do you lie?** When filling out questionnaires like this one.

**If you could change one thing about yourself, what would it be?** Nothing.

**What do you consider your greatest achievement?** Making it to the gym 5 days a week.

**What is the quality you most like in a man?** Sense of humor, manners, intellect, honesty.

**What do you most value in your friends?** Loyalty, honesty, willingness to laugh at my jokes.

**If you were to die and come back as a person or thing, what do you think it would be?** A fly on the wall.

**If you could choose what to come back as, what would it be?** Brad Pitt's favorite chair.

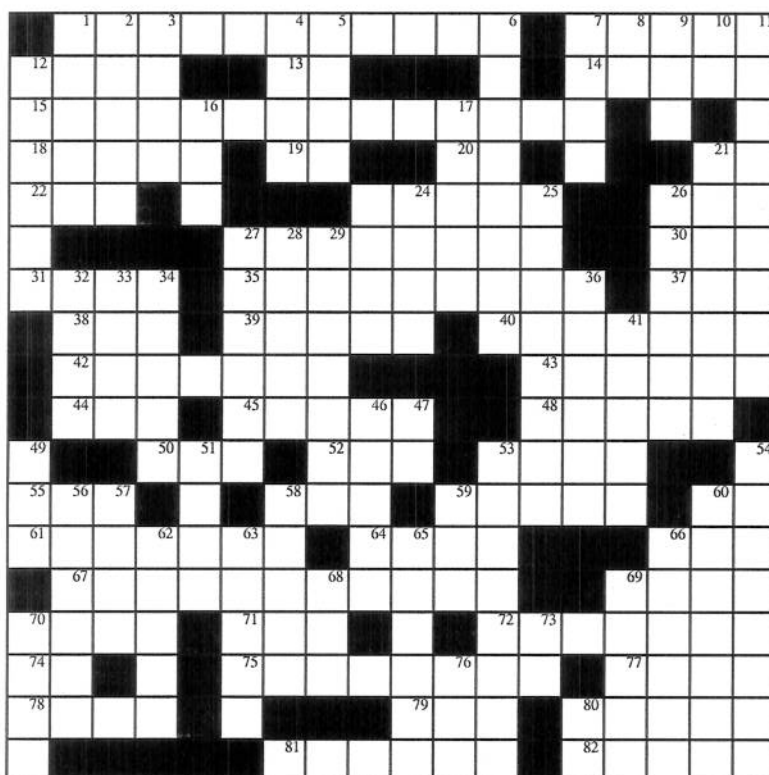
**What is your motto?** Don't get mad, get even.

## THE LIGHTER SIDE

## HOW TO HANDLE STRESS

1. Jam tiny marshmallow up your nose and try to sneeze them out.
2. Use your Mastercard to pay your Visa bill.
3. Pop some popcorn without putting the lid on.
4. When someone says, "Have a nice day," tell them you have other plans.
5. During your next meeting, sneeze and then loudly suck the phlegm back down your throat.
6. Find out what a frog in a blender really looks like.
7. Make a list of things you have already done.
8. Dance naked in front of your pets.
9. Put your toddler's clothes on backwards and send him off to preschool as if nothing was wrong.
10. Thumb through the National Geographic and draw underwear on the natives.
11. Go shopping. Buy everything. Sweat in them. Return them the next day.
12. Drive to work in reverse.
13. Read the dictionary backwards and look for subliminal messages.
14. Start a nasty rumor and see if you recognize it when it gets back to you.
15. Bill your doctor for the time you spend in his waiting room.



May I.T. Puzzle ..*Flower Power*.....**Across**

- |                       |                           |                        |
|-----------------------|---------------------------|------------------------|
| 1. May holiday        | 35. <i>A Train</i> Duke   | 61. Between 1 & 10th's |
| 7. Getting older      | 37. Asian holiday         | 64. First man          |
| 12. Verdi opera       | 38. Me to Miss Piggy      | 66. He wrote           |
| 13. B&O or Short Line | 39. Play — For Me         | <i>The Raven</i>       |
| 14. Water craft       | 40. Biblical letter       | 67. Mexico holiday     |
| 15. Az State Flower   | 42. Foretell              | 69. Buddies            |
| 18. Odor              | 43. Star flowers?         | 70. Went bareback      |
| 19. Empire State      | 44. Selection shortened   | 71. Soak flax          |
| 20. <i>The French</i> | 45. Sister's daughter     | 72. Aromatic plants    |
| 21. Do — mi           | 48. Loan sharking         | 74. Conjunction        |
| 22. Inform openly     | 50. DMV violation         | 75. Tire grip          |
| 23. Waxed cheeses     | 52. Pro-gun grp.          | 77. Fresh thought      |
| 26. French sea        | 53. Happy                 | 78. AZ highway grp     |
| 27. Fragrant flower   | 55. Retirement fund       | 79. Work unit          |
| 30. Actress Gardner   | 58. Extra wide shoe       | 80. Frosting           |
| 31. Tomlin's flower?  | 59. Little people flower? | 81. SOS                |
|                       | 60. Celebrity rep         | 82. Tempt              |

**Down**

- |                       |                         |                        |
|-----------------------|-------------------------|------------------------|
| 1. Florida city       | 24. Reject              | 54. Equestrian event   |
| 2. Lawn tool          | 25. Brazilian city      | 56. LP's or 45's       |
| 3. Wedge hammer       | 26. Gray —              | 57. Corrosive agent    |
| 4. Press              | 27. Twin sign           | 58. Greater seniority  |
| 5. Roast beef name    | 28. Arlo's café lady    | 59. Remit              |
| 6. 'Toon — <i>Sam</i> | 29. "Goosebumps" author | 60. Plant emissions    |
| 7. W.Coyote's vendor  | 32. Scamps              | 62. Nonreactive        |
| 8. Atlanta's state    | 33. Folk tales          | 63. Heart valve        |
| 9. — well             | 34. Make way            | 65. Sped to and fro    |
| 10. Shortened number  | 36. New Datsun?         | 66. Encyclo —          |
| 11. Produces          | 41. Probe               | 68. Greek letter       |
| 12. Attack            | 46. Whole milk fat      | 69. Cost               |
| 16. Entire            | 47. Each abbrev.        | 70. By way             |
| 17. Street speak      | 49. Pot cover           | 73. Indefinite article |
| 21. Hearty partying   | 51. Semper Fi group     | 76. Paramilitary group |
| 23. Blue pencil       | 53. Study of jewels     | of N. Ireland          |
|                       | 80. Book by S.King      |                        |